

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Standards of Conduct for Transmission)
Providers)**

Docket No. RM01-10-000

**COMMENTS OF THE
ILLINOIS COMMERCE COMMISSION**

I. INTRODUCTION

On September 27, the Federal Regulatory Commission (“FERC or “Commission”) issued a Notice of Proposed Rulemaking (“NOPR”) to "promulgate new standards of conduct regulations that would apply uniformly to natural gas pipelines and transmitting public utilities (jointly referred to [in the NOPR] as “transmission providers”) that are currently subject to the gas standards of conduct in Part 161 of the Commission's regulations and the electric standards of conduct in Part 37 of the Commission's regulations." NOPR at 1.

The Commission described its purpose in this rulemaking proceeding as follows: "In light of the changing structure of the energy industry, the Commission is proposing to adopt one set of standards of conduct to govern the relationship between regulated transmission providers and all their energy affiliates, thereby, broadening the definition of an affiliate covered by the standards of conduct, from the more narrow definition in the existing regulations." NOPR at 1.

By Notice issued by the Commission on October 26, 2001, the Commission established December 20, 2001, as the deadline for timely Comments in this proceeding. The Illinois Commerce Commission (“ICC”) hereby provides its Comments.

The ICC commends the Commission for its initiative to review the evolving general issue of transmission provider conduct and its relationship to the merchant function of the transmission provider or its affiliates. Competitive energy markets cannot be developed or sustained if transmission providers engage in discriminatory or preferential behavior with respect to merchant service providers. The ICC particularly applauds the Commission's proposal to broaden the reach of its affiliate rules to cover transmission provider relations with all energy affiliates rather than just energy marketing affiliates as is now the case.

Nevertheless, despite its support for the Commission's overall initiative, the ICC has several concerns about specific issues raised in the Commission's September 27 NOPR. The ICC respectfully recommends that the Commission: (1) reconsider its proposal to functionally separate the bundled retail sales function from the transmission function, and, instead, adopt either the ICC's primary recommendation or alternative recommendation (both described in Section II.A below); (2) convert its proposed RTO-exemption from the rules into an opportunity for RTOs to request waiver as described in Section II.B below; (3) modify the proposed rule to require that RTO-participating utilities support their waiver requests with sufficient evidence that the objectives of the NOPR rule have been satisfied through alternative means as described in Section II.B below; (4) remain flexible and open to the possibility that behavioral approaches to preventing undue discrimination may need to be replaced with structural approaches as described in Section II.C below; (5) codify the Commission's affiliate "code of conduct" provisions into the Section 358 rule as described in Section II.D below; and (6) modify proposed Section 358.5(b)(3) to give transmission customers control over how their confidential information is further treated after an

improper disclosure of that confidential information by a transmission provider as described in Section II.E below.

II. DISCUSSION OF ISSUES

A. Functional Separation of Bundled Retail Sales From Transmission

A major issue in this case is the Commission's proposal to enhance the functional separation provisions of Order 889 with respect to vertically integrated electric utilities' activities attendant to power purchases and sales made solely on behalf of retail native load. In Order 889, the Commission decided that a utility's purchases of power for retail native load are not "sales for resale" and, therefore, utility employees engaged in sales or purchases on behalf of retail native load would not be treated by the Commission as "wholesale merchant function employees" for purposes of applying the Order 889 standards of conduct/functional separation. Consequently, under the current Order 889 rules, utility employees engaged in the bundled retail sales function can also perform transmission functions without Commission restriction. Accordingly, a vertically integrated electric utility's bundled retail sales function currently may have access to all transmission system information, customer information of all non-affiliated competitors of the utility, and sensitive market information without running afoul of any Commission rule.

In its NOPR in this docket, the Commission attempts to address this issue by proposing to "apply the standards of conduct to require a separation of the transmission function from all sales functions, including bundled retail sales and a restriction on

preferential access to transmission information for the bundled retail sales function." NOPR at 12. The NOPR proposes to functionally separate all utility transmission function employees from all utility merchant function employees, regardless of whether the merchant function employees are engaged in wholesale sales or retail sales. Under such functional separation, utilities would be required to implement measures to restrict access by retail merchant function employees to competitively sensitive transmission system information, competitors' customer information, and sensitive market information generated by the utility in the course of its transmission function.

The Commission clarifies in its NOPR that it is not proposing to "assert jurisdiction over the underlying transactions in a bundled retail sale." NOPR at 13. Rather, the Commission's intention is merely to "ensure that all transmission customers, affiliated or non-affiliated, bundled or unbundled, will have equal access to the transmission providers' transmission information." NOPR at 13. The Commission particularly urged state commissions to provide their views on this functional separation proposal. NOPR at 13.

The ICC strongly supports the intent of the Commission's functional separation proposal. Competitive power markets cannot develop and be sustained if some power sellers have discriminatory access to the transmission system, to transmission system information, or to competitors' customer information.

However, the Commission's proposed action may be unnecessary in states, such as Illinois, that have already acted to address the anti-competitive implications of integrated utility provision of both transmission and market functions such as generation and retail sales. To illustrate, in 1997, the Illinois General Assembly and Illinois Governor adopted a

functional separation provision in the Electric Service Customer Choice and Rate Relief Law (“Customer Choice Law”) and included it in Illinois Public Utilities Act. See, PUA Section 16-119A. In Section 16-119A, the ICC was directed to adopt standards of conduct and to investigate the need for functional separation “between the generation services and delivery services of those electric utilities whose principal service area is in Illinois.” Section 16-119A was included in Illinois’ Customer Choice Law to “prevent undue discrimination and promote efficient competition” and to “meet the objective of creating efficient competition between suppliers of generating services and sellers of such services at retail and wholesale.” See Sections 16-119A(a) and 16-119A(b).

The ICC initiated rulemaking proceedings pursuant to Section 16-119A on February 19, 1998. See ICC Dockets 98-0147/98-0148. Beginning in 1998, numerous hearings were held and voluminous evidence taken. The record was first marked “heard and taken” on January 25, 1999. However, the ICC reopened the record on November 17, 1999 for the purpose of taking additional evidence on an optional Integrated Distribution Company (“IDC”) proposal for complying with Section 16-119A. On February 15, 2001, the ICC issued two Orders in these consolidated dockets authorizing submission of: (1) proposed standards of conduct/functional separation rules; and (2) optional proposed IDC rules to the Illinois Secretary of State’s Office to initiate First Notice publication. On October 24, 2001, the ICC issued its Second Notice Order in this consolidated docket and submitted its proposed rules to the Joint Committee on Administrative Rules of the General Assembly of the State of Illinois (“JCAR”) pursuant to Section 5-40(c) of the Illinois Administrative Procedure Act.

Once approved by JCAR, the ICC’s proposed Standards of Conduct/Functional Separation/IDC rule would become Part 452 of 83 Illinois Administrative Code. The ICC’s proposed Standards of Conduct/Functional Separation/IDC rule--Part 452—contains two Subparts. The first subpart is titled “Subpart A: Functionally Separated Utility Rules.” The second subpart is titled “Subpart B: Integrated Distribution Company Rules.” The provisions and requirements of Subpart A of Part 452 will apply to all electric utilities whose principal service area is in Illinois unless a utility voluntarily chooses to make itself subject to the provisions and requirements of Subpart B of Part 452.

Subpart A of Part 452 requires functional separation between an electric utility’s transmission/distribution function, on the one hand, and its generation services function, on the other hand. “Generation services” are defined for these purposes as “production, purchase, or marketing for retail sale; or the retail sale, of electric power or energy.”¹

Subpart B, however, provides Illinois utilities an option to avoid the functional separation requirements of Subpart A. An Illinois utility electing to make itself subject to Subpart B of Part 452 must forego any authorization it might otherwise have to engage in competitive retail sales service either within its own service territory or in the service territories of other Illinois electric utilities. Under Subpart B, an Illinois electric utility shall only be permitted to engage in retail sales to the extent required by law (Illinois law

¹ Subpart A does make a distinction between “merchant generation service” and “mandatory generation service.” “Mandatory generation services” are those retail sales functions that the utility is required to engage in by law. “Merchant generation services” are all other retail sales functions. The rules of Subpart A impose a greater degree of functional separation on the utility’s merchant generation function than they do on the utility’s mandatory generation function. The ICC carefully crafted the rules in this regard to respect the provision of Illinois law that requires electric utilities to continue to provide bundled service “consistent with” the bundled service provided by the utility on the date that Illinois’ Customer Choice Law was adopted. For example, Section 452.80 does not directly bar the utility’s mandatory generation function from access to the utility’s transmission and distribution information, but does so bar the utility’s merchant generation function.

places a provider of last resort obligation on incumbent electric utilities). Furthermore, with respect to its provision of provider of last resort service, an Illinois utility subject to Subpart B “shall not promote, advertise or market” its sales service.²

In effect, the Standards of Conduct/Functional Separation/IDC rule developed by the ICC would require each Illinois electric utility to functionally separate its retail sales function from its transmission/distribution function unless the utility voluntarily agrees to withdraw, to the extent possible, from the competitive provision of retail sales service. A utility that voluntarily withdraws from the competitive provision of retail sales service--thereby only providing statutorily-required retail sales functions in a passive manner—may remain integrated with the transmission/distribution function.

The Commission’s September 27 NOPR proposal to functionally separate a utility’s bundled retail merchant function from its transmission function would effectively nullify the Integrated Distribution Company option for Illinois utilities (Subpart B of Part 452) that the ICC adopted in its Section 16-119A rulemaking proceeding (ICC Docket 98-0147/98-0148). Furthermore, the Commission’s NOPR proposal may conflict with the ICC’s carefully crafted functional separation language in Subpart A of Part 452 that recognizes Illinois’ statutory requirement that bundled service continue to be made available “consistent with” the bundled service provided by utilities on the date that Illinois’ Customer Choice Law was adopted.³

² Nothing in the ICC’s IDC rule however, prevents companies from engaging in retail merchant function activities through use of separate affiliates of public utilities. In such cases, the ICC’s electric utility affiliate rules, Part 450 of 83 Illinois Administrative Code, would apply to the relationship between the electric utility and its affiliate.

³ The Commission’s proposed rule does this by not making a distinction between a utility’s “merchant generation function” and “mandatory generation function” as does the ICC’s standards of conduct/functional

The ICC applauds the Commission's pro-competitive objective in issuing the September 27 NOPR on affiliate relations and standards of conduct for transmission providers. Indeed, as a theoretical matter, an even greater degree of independence between the transmission function and market participant activities of the merchant function than that proposed in the NOPR could foster more vibrant wholesale and retail competition as the ICC explains in Section III.C below. When the transmission function is entangled with or influenced by particular market participant interests, its focus on actively providing non-discriminatory transmission solutions is compromised. Development of competitive markets would be difficult under those circumstances.

However, the Commission should honor the decisions of individual states, such as Illinois, that have directly addressed the issue of the relationship between utility bundled retail sales functions and utility transmission functions and taken actions to promote competitive markets. The ICC's sound and reasoned judgments, taken after consideration of voluminous evidence in Dockets 98-0147/98-0148, should not be uncereemoniously disregarded and over-ruled through the inclusion of four simple words in a FERC rule.

Therefore, the ICC proposes that Section 358.3(e) of the Commission's proposed rule be modified as follows to delete the words "or bundled retail sales":

358.3 Definitions

(e) Marketing, sales or brokering means a sale for resale of natural gas or electric energy in interstate commerce. Sales and marketing employee or unit includes (1) any pipelines sales operating unit, to the extent provided in 284.286 of this chapter, and (2) and electric transmission provider's sales unit, including those employees that engage in wholesale merchant sales ~~or bundled retail sales~~.

separation rule. In short, the ICC's standards of conduct/functional separation rule treats an electric utility's provider of last resort sales obligations differently from its competitive sales activities.

Implementing this simple change to the Commission's proposed rule will effectively retain the Order 889 status quo with respect to the relationship between an electric utility's bundled retail sales function and its transmission function.

In the event the Commission determines that adopting the ICC's primary recommendation and retaining the current Order 889 status quo would effectively result in the Commission abdicating its duty under the Federal Power Act to prevent undue discrimination in transmission service, then the ICC proposes the following alternative to modifying proposed Section 358.3 as described above. The ICC's proposed alternative would be for the Commission to permit each state a specific amount of time (for example, one year) to examine the relationship between each jurisdictional utility's bundled retail sales function and transmission function with an eye toward adopting state-by-state or utility-by-utility solutions to the potential for anti-competitive and discriminatory behavior that currently exists between electric utilities' internal bundled retail sales functions and transmission functions.

The ICC's alternative proposal here is procedurally analogous to the Commission's decision in Order 888 finding it necessary to apply a seven-factor test to identifying the split between distribution facilities and transmission facilities and delegating the responsibility for application of the test to individual states. In that instance, the Commission adopted a framework to accomplish its objectives and permitted states the flexibility to apply that framework to the particular circumstances in their states. The Commission could follow a similar approach here. To adopt this alternative proposal for addressing the relationship between an electric utility's bundled retail sales function and

transmission function, Section 358.3(e) should be left as it is proposed in the September 27 NOPR and Section 358.4(a)(1) should be modified along the following lines:

358.4 Independent functioning.

(a) Separation of functions.

(1) Except in emergency circumstances affecting system reliability, the transmission function employees of the transmission provider must function independently of the transmission provider's marketing or sales employees, and its energy affiliates' employees. **However, this independent functioning requirement will not be imposed on a transmission providing utility with regard to the relationship between bundled retail sales functions and transmission functions in a state that has specifically examined this matter and taken action prior to [a date 12 months after promulgation of this Rule] to prevent undue discrimination and promote retail and/or wholesale power competition in that state and that meets the standards established in this Rule. Each transmission utility subject to this rule that wishes to have this bundled retail service waiver provision applied to it shall make application [within 14 months after promulgation of this Rule] to the Commission with supporting evidence of applicable, effective state action.**

Application of this alternative would allow individual states, as an initial matter, time to investigate the potential for discriminatory behavior that the Commission has identified between the bundled retail sales function and the transmission function of electric utilities and to take steps, consistent with the practical realities in each state, to mitigate or eliminate the anti-competitive and discriminatory effects of that internal utility relationship. This alternative also recognizes the sincere efforts of states such as Illinois that have already addressed the discriminatory relationship between the bundled retail sales functions and the transmission functions of electric utilities in Illinois and adopted workable, competition-promoting mechanisms to address that discriminatory relationship.

Adoption of the ICC's alternative proposal is a more favorable approach with respect to the bundled retail sales issue. The ICC recognizes the potential value in having uniform standards of conduct apply to all transmission providers across the entire Midwest region as proposed by the Commission. Illinois' retail customers will be likely to benefit if electric utilities in the surrounding region are prohibited from engaging in preferential or discriminatory behavior vis-à-vis the relationship between bundled retail sales functions and transmission functions. The ICC believes that Midwest state regulators are better positioned to address any potential discriminatory behavior of utilities in their respective states.

The ICC is vitally interested in accomplishing solutions to discriminatory and anti-competitive conditions in the electric utility industry and in making competitive power markets work in our region. State commissions serve a vital role in safeguarding the interests of retail electric consumers, especially where the state commission is overseeing the development of a competitive retail electric market as is the case with the ICC. However, this direct retail responsibility is ineluctably entwined with state commissions' interests in development of a competitive wholesale electric market. As recognized by the Illinois Legislature, "A competitive wholesale and retail market must benefit all Illinois citizens." PUA Section 16-101A(d). Emphasis added. Accordingly, the Illinois Public Utilities Act directs the ICC to "promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers." *Id.*

The legislatures in several Midwest states, such as Illinois, have decided to replace traditional regulation with competition as the mechanism to protect retail customers from the exercise of market power in the provision of electricity supply. To illustrate, beginning May

1, 2002, all Illinois electric utility customers will obtain the right to choose alternative suppliers, and, beginning January 2, 2005, Illinois' statutory retail rate freeze will no longer be in effect. While the ICC has consistently urged the FERC to take steps to promote the development of effectively competitive wholesale power markets, the ICC has also simultaneously actively engaged in promoting competitive markets through its own individual case decisions and through the adoption of rules such as its Standards of Conduct/Functional Separation/IDC rule. Furthermore, the ICC has worked collegially with other states in the Midwest region on industry structure issues.

The ICC recognizes that there is much to be accomplished in the thirty-six months remaining before the expiration of Illinois' statutory retail rate freeze. Both the Commission at the federal level and the state commissions at the local level should work jointly to leverage their respective comparative advantages while simultaneously remaining sensitive to each other's pro-competitive objectives.

It is not necessary, in order for the Commission to obtain its pro-competitive objectives in this proceeding, to render moot, the ICC's decision with respect to the bundled retail sales function. Nor is it necessary, from the ICC's perspective, for the Commission to preempt, at this time, the decisions of other states in the Midwest region, provided that those decisions support a pro-competitive agenda. Adoption by the Commission of either the ICC's primary recommendation or the ICC's alternative recommendation, both described above, would respect the actions of states such as Illinois that have addressed the problem identified by the Commission in their own way and permit states that have not yet addressed this issue with sufficient time to do so.

B. Exemption of RTOs from the Proposed Rule and Waiver Opportunity for Utilities Participating in RTOs

Section 358.1(b) of the Commission's proposed rule states,

(b) This part applies to any public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce, except that this part does not apply to an electric transmission provider that is a Commission-approved Regional Transmission Organization (RTO). If an electric transmission owner participates in a Commission-approved RTO and does not operate or control its transmission facilities, it may request an exemption from this part.

Section 358.1(b) proposes to exempt RTOs from applicability of the rule. The Commission also provides to certain RTO participants an unbounded opportunity to request waiver from applicability of the rule. The ICC opposes both of these exceptions to applicability of the rule.

The Commission bases its proposed RTO exemption on the Order 2000 position that RTOs “would eliminate undue discrimination in electric transmission services that can occur when the operation of the electric transmission system remains in the control of a vertically integrated utility.” NOPR at 10. This position is based, presumably, on an assumption that RTOs will be sufficiently independent of market participant interests and possess sufficient operational authority to eliminate the possibility that the transmission function might continue, in an RTO context, to be used to discriminatorily advantage a market participant or class of market participants. The ICC is not nearly as confident of this RTO result, given its experience with the voluntary RTO development process to date.

The ICC recommends that, rather than providing RTOs with exemption from the NOPR rule, the Commission, instead, apply the rule to RTOs but specifically identify the standard of evidence that an RTO must satisfy to merit waiver from the provisions of the

NOPR rule. In effect, adoption of this recommendation would convert the Commission's proposed RTO exemption into an opportunity for RTOs to request waiver from the rule. This approach will ensure the existence of an adequate evidentiary basis for waiving the rule's applicability to RTOs.

The ICC also believes that it would be more appropriate for this rule to be designed so as to require an RTO-participating utility to submit evidence that the RTO in which it participates has structure, practices, and procedures that are properly designed to accomplish the objectives of the NOPR rule through other means. Once again, this waiver approach requires an applicant for waiver to demonstrate, with sufficient evidence, that it merits waiver of the provisions of the rule.

C. Behavioral Remedies versus Structural Remedies for Preventing Discriminatory Conduct by Transmission Providers

At page 26 of the NOPR, the Commission requested comments on "whether behavioral remedies for transmission providers, such as the standards of conduct or those mentioned above, are sufficient to limit anti-competitive behavior, or whether the Commission should consider imposing structural remedies." The ICC has not yet come to a final conclusion on this question in all of its applications. Structural remedies have the undeniable advantage of eliminating both opportunities and incentives for discriminatory or preferential conduct. With behavioral remedies, both the opportunity and the incentive for discriminatory or preferential conduct remain with the transmission-providing utility although the opportunity may be somewhat reduced.

The application of behavioral remedies, therefore, requires constant oversight and policing of utility conduct by regulators. It is futile for regulators to pursue behavioral remedies unless they: (1) are prepared to adopt meaningful standards of conduct rules; (2) are willing to require the submission of detailed implementation plans; (3) are willing to engage in thorough oversight of utility behavior; (4) are ready to conduct, and maintain on an ongoing basis, detailed compliance monitoring; (5) are reasonably able to identify actual violations of the standards of conduct rules; (6) have in place convenient complaint procedures for parties alleging harm from discriminatory utility behavior; and (7) have the ability and willingness to apply penalties that are large enough to deter undesirable behavior. In short, the decision to apply behavioral remedies, such as standards of conduct, to the relationship between essential utility functions such as transmission/distribution and potentially competitive functions such as retail sales will require application of ongoing heavy-handed regulation.

The application of structural remedies, on the other hand, would have the undeniable advantage of minimizing the need for ongoing heavy-handed regulatory policing of behavior, and relieve the Commission from “chasing after conduct”, a behavior that the Commission has expressed a desire to avoid altogether. Order 2000 at 31,069. Structural remedies have the additional benefit of removing nagging uncertainties that market participants might otherwise have about fairness when dealing with vertically-integrated transmission providers subject to standards of conduct. Investment is likely to increase and market activity is likely to be more vibrant in business environments where structural remedies have removed clouds of doubt about obtaining fair treatment. The ICC would

direct the Commission to its own Order 636, which adopted a structural solution to problems of discrimination and preference in the natural gas pipeline business. Order 636 provides a useful model and has features that could be beneficially applied to the electric industry. While it is true that structural separation between a utility's transmission function and its internal merchant function would eliminate a potential competitor (the utility's internal merchant function), nothing about the structural remedy to this problem eliminates the utility parent's opportunity to compete in the same markets using a separate affiliate subject to affiliate relations rules between it and the utility.

With respect to the relationship between an electric utility's bundled retail sales function and its transmission function, however, the Illinois Legislature and the ICC has decided, at least for the time being, deemed a behavioral approach (as represented by the ICC's Standards of Conduct/Functional Separation/IDC rules adopted in ICC Dockets 98-0147 and 98-0148) to be more appropriate. That being said, the ICC and the Illinois legislature have not completely foreclosed the option of adopting structural separation between Illinois transmission/distribution functions and merchant functions in the event the aforementioned behavioral approach is unsuccessful. The ICC recommends that the Commission adopt a similarly flexible stance on this structural separation question at this time.

D. The Commission's Affiliate "Code of Conduct" Should Be Codified in the Commission's Rule

At page 26 of the NOPR, the Commission makes the observation that its Order 889 standards of conduct and its proposed rules in this docket are designed only to apply to the

relationship between a utility's transmission function and the merchant function of the utility or the utility's affiliate. As the Commission notes, the Commission has used a case-by-case development approach over the years to develop an affiliate relations code of conduct to apply to the relationship between the regulated utility, as a whole, and its unregulated affiliates. In Commission terminology, "standard of conduct" defines the rules governing the relationship between a utility's transmission function and the merchant function of the utility or its affiliate and "code of conduct" defines the rules governing the relationship between the utility as a whole, on the one hand, and its affiliates on the other. As the Commission observes, the stated purpose of the affiliate "code of conduct" that has been built up over the years in case-by-case decisions is to "protect captive ratepayers of the investor-owned public utilities." NOPR at 26. The stated purpose of the "standards of conduct" is to prevent discriminatory conduct between the transmission function and the merchant function.

The NOPR asks parties to comment on whether the Commission should codify the body of code of conduct practices that it has developed on a case-by-case basis over the years into its proposed standards of conduct rule. NOPR at 26. The ICC supports this proposal. FERC's rules should gather in one place not only the rules that apply to the relationship between a utility's transmission function and the merchant function of the utility or its affiliate, but the rule should also include the code of conduct that applies to the relationship between the utility, as a whole, and its affiliates. Gathering the conduct rules together in one place in this manner would ease administrative implementation and avoid potential overlap and conflict.

E. Treatment of Confidential Customer Information

Section 358.5(b)(2) of the Commission's proposed rule prohibits a transmission-providing utility from sharing information that it receives in the course of its role as transmission provider from customers or potential customers with the utility's merchant function. This is a vital provision as it prevents the utility's merchant function from obtaining undue preferences with respect to other marketers who are competing to obtain or retain power sales customers and preserves the confidentiality of transmission customer information. Proposed Section 358.5(b)(3), however, provides that, if a transmission-providing utility provides transmission customer information to its merchant function in violation of Section 358.5(b)(2), then "the transmission provider must immediately post such information on the OASIS or Internet website."

This public posting requirement of Section 358.5(b)(3) may further harm the transmission customer whose confidential information was disclosed by the transmission provider in violation of the Commission's rule in Section 358.5(b)(2). Indeed, Section 358.5(b)(3) would require that if the transmission provider discloses the transmission provider's confidential information to one party, then the confidential information must be disclosed to all parties. From the transmission customer's perspective, the harm from the utility's disclosure of confidential information may be compounded by the Commission's rule in Section 358.5(b)(3) requiring further disclosure.

The ICC believes a more appropriate solution to improper disclosures of confidential customer information by the transmission provider would be for the Commission to penalize the transmission provider for violating the rule and give the transmission customer the

authority to decide if it wishes its confidential customer information to be further disclosed or if it wishes the improper disclosure to go no further. The Commission's proposed Section 358.5(b)(3) provision disenfranchises transmission customers and prevents them from regaining control over their confidential information just because the transmission providing utility violates the Commission's rule in Section 358.5(b)(2) prohibiting disclosure (and violates the transmission customer's trust).

The ICC, therefore, proposes that the transmission customer be empowered to decide how its confidential information is to be treated after an improper disclosure of that information by the transmission provider. Section 358.5(b)(3) of the Commission's proposed rule, should, accordingly, be modified.

III. CONCLUSION

WHEREFORE, for all of the reasons explained above, the ICC respectfully recommends that the Commission: (1) reconsider its proposal to functionally separate the bundled retail sales function from the transmission function, and, instead, adopt either the ICC's primary recommendation or alternative recommendation (both described in Section II.A above); (2) convert its proposed RTO-exemption from the rules into an opportunity for RTOs to request waiver consistent with the ICC's recommendations in Section II(B) ; (3) modify the proposed rule to require that RTO-participating utilities support their waiver requests with sufficient evidence that the objectives of the NOPR rule have been satisfied through alternative means consistent with the recommendations herein ; (4) remain flexible and open to the possibility that behavioral approaches to preventing undue

discrimination may need to be replaced with structural approaches consistent with the ICC's recommendations in Section II(C) above; (5) codify the Commission's affiliate "code of conduct" provisions into the Section 358 rule consistent with the ICC's recommendations in Section II(D) above; and (6) modify proposed Section 358.5(b)(3) to give transmission customers control over how their confidential information is further treated after an improper disclosure of that confidential information by a transmission provider consistent with the ICC's recommendations in Section II(E) above.

Dated: December 20, 2001

Respectfully submitted,

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